EXHIBIT E

UNITED STATES DISTRICT COURT
DISTRICT OF DELAWARE

IN RE: ARMSTRONG WORLD INDUSTRIES, INC., et al., Debtors.	CHAPTER 11 Case Nos. 00-4471 00-4469 00-4470
IN RE: W.R. GRACE CO., et al., Debtors.	CHAPTER 11 Case No. 01-1139 through 01-1200
IN RE: FEDERAL-MOGUL GLOBAL, INC., T & N LIMITED, et al., Debtors.	CHAPTER 11 Case Nos. 01-10578, et al
IN RE: USG CORPORATION, a Delaware Corporation, et al., Debtors.	CHAPTER 11 Case Nos. 01-2094 through 01-2104
IN RE: OWENS CORNING, et al., Debtors.	CHAPTER 11 Case Nos. 00-3837 through 00-3854

January 16, 2004
Newark, New Jersey

B E F O R E: HONORABLE ALFRED M. WOLIN, USDJ

Pursuant to Section 753 Title 28 United States Code, the following transcript is certified to be an accurate record as taken stenographically in the above-entitled proceedings.

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THE COURT: The first thing I'd like to do is take appearances please.

MR. ENGLERT: Roy Englert on behalf of the Movants Kensington and Springfield.

THE COURT: Good morning.

MR. NEAL: Good morning, your Honor. Stephen Neal on behalf of USG.

THE COURT: Good morning, Mr. Neal.

MR. MANCINO: Richard Mancino on behalf of D.K. Acquisition Partners, Fernwood Associates, Deutsche Bank Trust Companies America.

THE COURT: Thank you. Good morning.

MR. MONK: Good morning, your Honor. Charles Monk, Matthew Dobson, Henry Abrams and Norm Pernick on behalf of the Owens Corning debtor. I'm the only one speaking.

THE COURT: Okay. Thank you.

MR. CRAMES: Good morning. Michael Crames and Jane Parver of Kaye Scholer for James McMonagle, the futures rep in Owens Corning, and Dean Trafelet, the futures rep in USG and Armstrong.

THE COURT: All right. Good morning, Mr. Crames.

MR. INSELBUCH: Elihu Inselbuch from Caplin & Drysdale for the Asbestos Committees in Owens Corning, USG, W.R. Grace and Armstrong.

THE COURT: Okay. Thank you.

MR. BERNICK: Good morning, your Honor. David Bernick for Grace.

THE COURT: All right. Good morning. A couple of housekeeping matters, if we may. Mr. Englert, I have a letter from Mr. Orseck dated January 14, 2004, and the letter pertains to Judge Dreier's notes requesting that they be filed under seal and we will take care of that if you'll submit to us a sealing order.

MR. ENGLERT: Yes, your Honor.

THE COURT: Your application is granted. Mr. Mancino, I have a slight problem. Your brief wasn't received until this morning. It was filed electronically in Delaware yesterday at 12:17. You're the only counsel that did not afford this Court a courtesy copy.

I have not read your brief. You may argue today, I'm going to permit you to argue, but I've not read your brief. I've read every brief that was submitted with a courtesy copy to the Court. You're the only one that didn't.

MR. MANCINO: Your Honor, I have no explanation but I do have an apology for that oversight.

THE COURT: I just want to let you know I haven't read your brief. I'm going to permit you to argue.

MR. MANCINO: Thank you, your Honor.

THE COURT: Okay. I've established the order of

argument. It will be the Owens Corning movants, so, that will be you, Mr. Englert, and then the W.R. Grace movants, that will be you, Mr. Mancino, then the debtor USG Corp., that will be you, Mr. Neal, and then what I think we'll do is we'll then take a ten-minute break and then we'll go to the debtor, Owens Corning, the debtor, W.R. Grace, and the committees, who are going to share their time.

Everybody has 30 minutes. There will be a sign when you have five minutes left. The Court reserves the right to engage in a colloquy and I guess everybody by invitation would be pleased with that because anyone who's ever argued an appeal in any court would not like to just stand there for 30 minutes and just have the court look blankly at you.

I'll try not to interrupt unduly. I don't want to use the word sparingly because it's taken on its own life in this case. Should we have an undue colloquy, I will consider that in your request for more time. I have nowhere to be today so I've got all day for this.

Mr. Englert, with that being said, you may approach. I don't care if counsel use the counsel table or use the podium, it's up to them.

Mr. Englert, you may proceed.

MR. ENGLERT: Thank you very much, your Honor, and good morning again. Let me say I certainly welcome

colloquy. What's of interest to you is of interest to me.

I would like to start with the question of did your advisers render advice, and I start with that question because the Third Circuit, in its opinion, quoted paragraph ten of Mr. Gross's November 14 affidavit in which he said he rendered no advice, and I was surprised to read in the W.R. Grace brief yesterday that the advisers rendered no advice and there is no contrary evidence. On page 202 --

THE COURT: You're going to have to let me get with you if you're going to refer to transcripts. Is that what you're going to do?

MR. ENGLERT: Briefly, yes, your Honor.

THE COURT: Just tell me whose transcript.

MR. ENGLERT: Judge Dreier's.

THE COURT: Okay. I have Judge Dreier's transcript, page 202.

MR. ENGLERT: This is under questioning from Mr. Inselbuch's partner, Mr. Finch.

THE COURT: Could you give me a line please.

MR. ENGLERT: Sure. Lines seven to nine, your Honor.

THE COURT: Okay.

MR. ENGLERT: Judge Dreier said "I didn't see this as being pro plaintiff or pro defendant. It was just to render advice to try to achieve that end, the end of making

sure the truly injured were compensated."

Later on the same page, lines 21 through 23, Judge Dreier, "The earlier meetings were closer together when we thought something could be done with our advice to help to resolve these matters."

The Grace brief filed yesterday, which is the brief that takes the position there was no advice and there is no contrary evidence, quotes on page 17 from Judge Keefe's deposition --

THE COURT: Yes.

MR. ENGLERT: These are brief quotations, your Honor. I'm happy to wait for you but I think they'll be quick.

THE COURT: It's just a matter of finding them. Go ahead. I have it.

MR. ENGLERT: Judge Keefe, early in his deposition, in describing his understanding of the role he was given by this Court, said he was -- "We were going to" -- "he", your Honor, "was going to ask us to give him advice with respect to some issues that may have applied to the litigation in general with respect to management."

Couple pages later, the Grace brief quotes in footnote 17, where Mr. Gross's deposition, "QUESTION: If we were to use the label 'adviser' to describe your position, is there any better or more accurate term that we can think

of other than an adviser to describe your duties in connection with the five cases?"

"ANSWER: No."

The next page, footnote 18 quotes from Judge Hamlin's deposition to the extent he saw his role as an adviser.

So, I'm not quite sure, your Honor, what Mr. Gross in his affidavit and the authors of the Grace brief mean in saying there was no advice, but every adviser testified either that he gave advice, that all the advisers gave advice, that the Court asked for advice or that adviser was the best way to describe it.

THE COURT: I guess we'll have to go to Webster to find out all the ramifications of what the word "advice" means. Did they provide background, history? Is that advice? Certainly.

MR. ENGLERT: Yes.

THE COURT: There's been no contra-statement that they didn't provide that type of background. That's advice.

MR. ENGLERT: I agree.

THE COURT: Whether they gave substantive advice as how to decide legal issues, I think if you read the depositions in their total, totality, you'll find that they never gave me substantive legal advice as to how to decide an issue. But you may proceed.

MR. ENGLERT: Well, your Honor, a couple comments on that, if I may. First of all, I would respectfully disagree with you. For example, at page -- I may not have the right page off the top of my head but around page 62 of Judge Dreier's deposition, I believe there was testimony about substantive advice but, in any event, your Honor, skillful advocates can give historical background in many different ways and they can lead people toward certain conclusions.

With background information, even if everything that's presented is presented in a way that each fact alone is irrefutable but the sum total of what's being given is being given from a particular perspective, so, I don't think the requirement for finding that there are conflicted advisers in the case law is that the adviser must be proven to have said to the judge, Judge, please decide this issue this particular way.

I think the problem with conflicted advisers that runs through the case law is when people have an interest in stating things from a particular perspective, it is assumed that there is a problem.

THE COURT: Well, you will agree, won't you, that when you asked that question of the advisers, most of them categorically said they gave no substantive legal advice. Would you agree with that?

MR. ENGLERT: No, I would quite strongly disagree, at least with respect to Judge Dreier. With respect to --

THE COURT: You asked the question of almost every one of the advisers whether there was any discussion of claim valuation or validity of claims. Everybody said no.

MR. ENGLERT: I don't think that's correct, your Honor.

THE COURT: The only one you rely upon is Dreier, whose statements disagree with the other four, but, you know, you can try to convince me, and I don't really want to waste your time arguing the issue. You and I have a different conception of what advice really means.

I'm satisfied the record will demonstrate that there was no substantive legal advice given, probably discussed a hundred different issues that portend asbestos litigation. There's never been a denial of that.

MR. ENGLERT: Well, your Honor understands my position.

THE COURT: Sure.

MR. ENGLERT: And I do suggest that Judge Dreier, a completely unconflicted adviser from anyone's standpoint, not only testified that substantive advice was given but has contemporaneous notes that certainly seem to suggest that his testimony was --

THE COURT: The Circuit Court of Appeals will have

the opportunity to see those notes --

MR. ENGLERT: Okay.

THE COURT: -- if the matter should go there.

MR. ENGLERT: Let us talk about what some of the subjects of these discussions were. We've at least tentatively for purposes of this discussion agreed to disagree about what advice constitutes.

Let's talk about subject matters, whether to convene a Rule 706 panel to look into scientific criteria, proof of claim forms, American Thoracic Society guidelines, what to do with unimpaired claimants, fraudulent conveyance, estimation under Section 502(c) trust distribution processes or procedures, I can never remember.

THE COURT: These are all the items that you listed in your brief, if I recall.

MR. ENGLERT: We listed these and additional items, yes.

THE COURT: Right.

MR. ENGLERT: And with citations to each deposition and documentary evidence suggesting that all of these subjects were discussed. Many, many of these subjects overlap closely with the G-1 Holdings case and, in fact, as your Honor is well aware, on certain occasions your Honor has issued rulings and very soon after you have issued a ruling, either Judge Gambardella or Judge Bassler has been

urged to follow your Honor's ruling.

As you also know from our brief, Judge Chin, in the Southern District of New York, in the Keene creditors trust case, was urged to follow a path similar to your Honor's path in the Sealed Air decision with regard to fraudulent conveyance.

THE COURT: And by the way, I didn't learn that until yesterday when I read your brief.

MR. ENGLERT: I learned very recently myself, your Honor.

THE COURT: I know nothing about the Keene trust case. I know that Mr. Gross is involved in it. I do not even know the issues in it, nor do I really know the issues in G-1, as I have said to the Circuit Court of Appeals before.

MR. ENGLERT: But you see, your Honor --

THE COURT: No, no. And I've never spoken to Judge Bassler about G-1, nor have I spoken to Judge Gambardella about G-1. I know it's an asbestos litigation not being administered by me.

MR. ENGLERT: And that's the point. That's the point, your Honor. You are not following G-1, you are not following these other litigations, but you are being advised by the people who not only follow them but are partisans in these litigations, and it's rather difficult for your Honor

acting in complete good faith to filter out what may be advice that is colored by the roles these gentlemen are playing in other litigation from what advice is not colored by their roles in other litigation, but that's the core fundamental problem here.

And as your Honor is aware, the major cases talking about disqualifying a judge because of his advisers, they're mostly law clerk cases. There also one Rule 706 expert case but the generic --

THE COURT: And then there's the Reilly case.

MR. ENGLERT: I'll come to Reilly. It's a very important case for our side.

THE COURT: Okay.

MR. ENGLERT: But your Honor, the cases that involve disqualification of judges are not cases of judges who have said, by golly, I want to get bad advice from these people. They're cases of judges who, operating in all innocence, have gotten advice from people with conflicts and have, in the words of, I believe it's the Hall case, then made errors of judgment once the conflicts were called to their attention of the advisers.

Now, let me turn, your Honor, since your Honor has expressed an interest in that, we have never argued, your Honor, that there's anything wrong with appointing advisers in this case. Reilly provides good support for the

proposition that your Honor had the authority on December 20, 2001, on December 28, 2001, to appoint advisers.

The problem is conflicted advisers, and Reilly does not stand for the proposition that advisers serving a conflicting role in other litigation may be appointed.

Quite the contrary. The First Circuit, in rejecting the government's argument in that case, emphasized both waiver and the problem that the objection was not well-taken on the merits because there was no allegation of bias, there was an unbiased adviser.

In fact, the judge in Reilly, trial judge had earlier tried to appoint someone who did have a conflict or not tried to, had been thinking about, discussing appointing someone who did have a conflict. That person was not appointed. He came up with someone who was unbiased and the First Circuit said if there were any suggestion of bias on this record, we would consider reversing for plain error. So, yes, we read Reilly for all it's worth. It stands for the proposition, and you can see as far as we're concerned it stands for the proposition you had the authority to appoint advisers but one must be careful what advisers one appoints.

THE COURT: You will concede that when I appointed Gross on December 28, he had not been appointed in G-1. I think he was not appointed till January of 2002.

MR. ENGLERT: I think that's correct with regard to formal appointment.

THE COURT: I think that Hamlin had been appointed sometime in September.

MR. ENGLERT: October 10, I believe was the date.

THE COURT: September, October of 2001. My appointment was December. I may have known about Hamlin's appointment. I'm not sure whether I knew or learned later on or whatever. But when I appointed Gross, he was not appointed in G-1 at that time and I had no knowledge of his pending appointment. I certainly did learn after his appointment.

MR. ENGLERT: Okay. Well, your Honor, our --

THE COURT: And I've never contended otherwise.

MR. ENGLERT: All right. We don't need to have a dispute about this particular point, but where we may not see eye to eye is on the question of what consequences flow from your Honor's knowledge of Hamlin's role and your Honor's knowledge a bit after the appointment of Mr. Gross's role in G-1.

Once those gentlemen were serving as partisans down the hall in the G-1 case on issues very similar to those they were certainly discussing with this Court, frankly, this Court had a problem and the --

THE COURT: Assuming that this Court knew of the

similarity of the issues, which it did not.

MR. ENGLERT: No, your Honor. I really respectfully would disagree with you. You have an even greater problem if you didn't know of the similarity of the issues because in all, as I said earlier, in all innocence you had no way to filter out the advice that may have been tainted by knowing that it had something to do with what was going on down the hall.

THE COURT: I just learned in the briefs recently or discovery reading that G-1 had a substantive consolidation issue. I never knew about that, never influenced me in any way, nor would it.

MR. ENGLERT: No, your Honor. Again, at the risk of repeating myself, I am not suggesting that your personal knowledge of what was going on down the hall is a problem here.

I am suggesting that the role of Mr. Gross and Mr. Hamlin being advocates down the hall with respect to some issues pending before you creates a problem of appearance of impropriety under Section 455(a) because you were receiving advice from people who had an incentive to slant their advice in particular ways.

The recent decision just a week ago, which you may have seen in our brief, of the 6th Circuit discussing bankruptcy examiners in the Big Rivers Electric case pointed

out the reason examiners have to be disinterested is because there's an incentive to shade their actions one way or another and to find an examiner not disinterested, one doesn't have to say the examiner acted on his conflict. One has to say simply he had a conflict, and that's a problem. And again, with the Hall and First Interstate cases, when an adviser had has a conflict, the Court has a conflict.

THE COURT: Okay. I understand your argument.

MR. ENGLERT: Let me, if I may, your Honor run through quickly --

THE COURT: Sure.

MR. ENGLERT: -- what the conflicts are with respect to three of the advisers in this case.

Mr. Gross is counsel to the futures representative in G-1 Holdings. Not only is that a very similar case, but as was admitted in the argument before the Third Circuit, some of Mr. Gross's clients in G-1 Holdings are necessarily parties to the Owens Corning case. They are necessarily future claimants in Owens Corning, just as they are future claimants in G-1 Holdings.

That is a major, major problem not even alluded to in any of the briefs filed by respondents with your Honor yesterday. Overlapping parties between the two cases mean we're beyond issue conflicts, and we're into the realm that it's as if the case were Smith v. Jones and Mr. Smith's

lawyer in some other case were serving as a court-appointed lawyer in Smith v. Jones. It's a very large problem.

Second problem which we had a brief colloquy about already this morning and which, apparently, not much more to say about it, is the Keene creditors trust problem. Again, another case like G-1 Holdings in which Mr. Gross went to another judge and urged that judge to follow your Honor's rulings in one of the five asbestos cases in which he was serving as adviser to your Honor.

The third problem, Mr. Gross served as a mediator, and there are two particularly fundamental things mediators must do. One is be neutral, and this is just the same problem over again with regard to the role as mediator, in addition, with regard to adviser, having a non-neutral mediator is, as far as I know of, unheard of in American jurisprudence. But Mr. Gross served as a mediator in the five asbestos cases while also being an advocate in G-1.

The second problem, mediators may not disclose the substance of parties' negotiating positions to the court unless there is consent by the parties.

Now, let me try to put to one side a false issue here. There certainly was consent by the parties to mediation in which your Honor was personally involved, and I believe it was June of 2003, after the --

THE COURT: That's my understanding.

MR. ENGLERT: We're not at all complaining about that. It is a problem, however, that before June of 2003, there appears to have been unconsented to revelation of parties' settlement positions to your Honor.

Professor McGovern, in his deposition, was extremely emphatic that that's a major, major no-no in mediation. Mr. Gross, in his deposition, said, oh, yes, I've done that and Professor McGovern has done that.

And this is, of course, sliding into one of the two problems we have with Professor McGovern based on discovery.

THE COURT: What's not been said, Mr. Englert, if I may, there were several status conferences in the Owens Corning case held in open court here, anywhere between 20 and 40 people in attendance, including Professor McGovern, all the people from all constituencies concerned in the substantive consolidation case, even Judge Fitzgerald was here, where the parties at that time discussed matters that would be used in a mediation.

For example, I remember sitting here and having the bank say that the asbestos litigation was worth, claims of the ACC were two billion dollars and other people on the other side of the room saying they could run as high as 24 billion, and then people said maybe it's 16, maybe it's 12. You know, there was no secret with --

MR. ENGLERT: Except, your Honor --

THE COURT: Let me just finish.

MR. ENGLERT: I apologize.

THE COURT: And I'm taking your time, I'll give you another minute. There was no secrecy as to where the banks were, the bonds were, the asbestos litigants. Everybody knew the numbers. There wasn't any revelation.

And certainly in June, when there was a consensual mediation of trying to settle the case, the Court was told all the numbers and the numbers never changed, so, there was never any revelation to the Court from any mediator as to what was supposed to be non-neutral information. You may proceed.

MR. ENGLERT: Thank you, your Honor. Your Honor has referred to the valuation of the tort claims and we do have a concern about the revelation of those terms. But there's another set of numbers that appear to have been revealed by mediators that I don't believe were ever discussed in the court. The Court can certainly correct me if I'm wrong, but I don't believe these numbers were ever discussed in open court, and that is, the settlement value of the bonds' guarantees, how many cents on the dollar the --

THE COURT: In June the bonds were here. There was a discussion of what the bonds would get on the dollar, I can give you the number, and, further, if they decided to

take a payment by stock instead of cash, it could add three cents on the dollar.

MR. ENGLERT: Yes, your Honor, that's June of 2003, post trial.

THE COURT: That's correct.

MR. ENGLERT: Now, the problem I'm talking about arose, we believe, in November of 2002, pretrial.

THE COURT: Okay.

MR. ENGLERT: There is a document that I want to be careful about referring to in light of your Honor's past rulings. I think you're aware we disagreed with your Honor's rulings on 408, but I want to be very careful about what I say in open court, but there is a document and there is deposition testimony suggesting that before June of 2003, there was revelation to your Honor who was going to try the substantive consolidation case before there was later consent to mediation about the parties' positions. That's a problem.

THE COURT: Do you know that there were -- I can't tell you how many status conferences, probably the Kramer Levin people, who keep records because they get paid for that and I don't, probably know far better than I do how many there were. When I say all of this was revealed to the Court, the trial didn't take place until late April or middle of April and continued into May. So, these numbers

were known, these numbers were known by the Court.

MR. ENGLERT: I don't think the settlement offers were known by the Court. I think the parties' litigation positions were known by the Court.

THE COURT: Yes. The parties' litigation positions were known by the Court and numbers attributable to each side were known to the Court. Where there actual settlement number was, that may be something different. You know, maybe the banks said I want 78 but we're willing to take some lesser number. That I would not have known. That I wouldn't have known. But I did know numbers based upon the status conferences.

In fact, because I didn't want to be involved in it, I appointed McGovern as a mediator and I appointed Judge Fitzgerald as a settlement judge. I think they went to Pittsburgh. I think they went to New York, wherever.

MR. ENGLERT: Your Honor, let me say if the trial judge is advised of parties' settlement positions in advance of trial, that's a problem, and it's a problem because it may lead the trial judge --

THE COURT: It's not a problem if it's consensual.

MR. ENGLERT: It's not a problem if it's consensual, but if there's a mediation with certain mediators and then those mediators reveal that information to the court without consensual information, that's a

problem.

Professor McGovern testified very emphatically that's a problem, and I'm being a little imprecise in what I'm saying here because I want to be careful about your Honor's rulings, but I would suggest for the reasons given in our brief, it's a problem.

THE COURT: Okay. We understand.

MR. ENGLERT: Now, the other issue we have raised in our brief with respect to Professor McGovern is we learned through the proceedings on remand not only that Professor McGovern has been meeting with futures representatives on a regular basis, which is a somewhat eyebrow-raising fact, but that they regard him as their mentor in the process of pushing legislation on Capitol Hill --

THE COURT: I saw --

MR. ENGLERT: -- that could affect the outcome of these very cases.

THE COURT: I saw the e-mail.

MR. ENGLERT: We would suggest that a neutral mediator who is meeting regularly with one side of the proceeding, to give them information, I don't remember Professor McGovern's exact words, but to give them information that would in substance make them more effective in doing that job and help them lobby on Capitol Hill has

stepped out of the neutrality.

THE COURT: He's an academic. He's the leading academic in the nation on mass tort and asbestos bankruptcy Chapter 11 litigation. He speaks to many constituencies. He's been a reporter to many committees.

MR. ENGLERT: And speak -- I'm sorry.

THE COURT: And he was there to offer whatever he could offer.

MR. ENGLERT: Speaking in the sense of giving public speeches is, of course, not a problem with an academic. Writing --

THE COURT: Professor McGovern probably gives 20 speeches a year and probably does ten programs a year like Mealey's all over the country.

MR. ENGLERT: These were not Mealey's programs to which anyone could come. These were not speeches to which anyone could come.

THE COURT: It was, my understanding, a gathering of futures who were, as I now learned from reading, were talking about the position they should take in connection with the FAIR legislation in asbestos, and he was there to provide an oversight of what was going on that he understood in his academic position, because if you talk to McGovern, he's got four ways the legislation should go. All right. But you may continue.

MR. ENGLERT: But he was not, your Honor, having meetings like this and having e-mail exchanges like this with commercial creditors, with a group of debtors, with equity holders, lots of other constituencies in this case. It was with the futures representative Professor McGovern was meeting and corresponding with.

THE COURT: Can you tell me if the legislation were to pass, is that better or worse for creditors than if it failed, because actually you're coming --

MR. ENGLERT: The S1125?

THE COURT: -- you're coming at it from a creditor's point of view, I take it.

MR. ENGLERT: My clients are commercial creditors.

THE COURT: That's right.

MR. ENGLERT: And they, I believe, support the current form of S1125.

THE COURT: Would they receive more under the FAIR legislation than they would receive if there were no legislation?

MR. ENGLERT: That depends in part on the outcome of the substantive consolidation issue. I think they get a hundred cents on a dollar if there is not substantive consolidation and I think they probably are not better off under S1125 than by winning substantive consolidation.

THE COURT: Okay.

MR. ENGLERT: I see I have relatively little time. Let me --

THE COURT: If I've interrupted you, I'll give you a couple extra minutes.

MR. ENGLERT: Thank you. I appreciate that, your Honor. Let me turn to a couple things I haven't gotten to.

Ex parte contacts and some of the defenses that have been raised, there is no rule of law that says ex parte contacts are okay as long as they're even-handed, and I do understand your Honor met with any constituency, not with any one constituency. This is not like --

THE COURT: Even Mr. Brodsky twice.

MR. ENGLERT: Well, with respect, your Honor, to Mr. Brodsky, other than in the context of the consented-to mediation in June of 2003 --

THE COURT: And there was an ex parte conference in that consensual mediation as well.

MR. ENGLERT: Yes.

THE COURT: Which he frankly admitted to in his deposition.

MR. ENGLERT: Of course.

THE COURT: Okay.

MR. ENGLERT: Sure. I'm not disputing you on the facts. I am suggesting that the legal significance of consented-to mediation involving the Court is rather

different from the legal significance of ex parte contacts that --

THE COURT: Go ahead.

MR. ENGLERT: Rather, that your Honor said on December 23rd were not in the nature of settlement discussions.

THE COURT: Did you take the position, because you alluded to it in your brief, that all these five jointly administered cases and the asbestos litigation through bankruptcy as opposed to the torts system isn't complex and isn't extraordinary? Is that your position?

MR. ENGLERT: You may assume for purposes of this decision that I admit they're complex. My client has a view that they're not particularly complex as commercial bankruptcies go, but we're not basing any of our legal arguments on the --

THE COURT: Because Judge Becker, when he assigned these, he thought they were extraordinary and he thought they were complex and, in fact, he said so.

MR. ENGLERT: Fine. Let me say none of our legal position turns on the proposition that it's not complex.

THE COURT: There was something in your brief that it's not as extraordinary or complex as maybe Judge Wolin thinks.

MR. ENGLERT: No, I didn't write it that way and I

sure hope you didn't take it that way. The rest of that sentence --

THE COURT: All I do is read the language.

MR. ENGLERT: The rest of that sentence says the Court may assume that these cases are complex for purposes of these --

THE COURT: Okay.

MR. ENGLERT: But we've already talked about the Reilly case and why complexity doesn't generally justify departure from the ordinary rules.

Let me say something about bankruptcy and whether bankruptcy is different. Bankruptcy is different. Why is bankruptcy different? For just the opposite of the reason my friends on the right-hand side of the courtroom say.

Bankruptcy is a system in which heavy emphasis is placed on disclosure. Heavy emphasis is placed on disinterestedness. The definition of disinterestedness in Section 101(14) of the Code is extensive. Section 327 requires disinterested professionals be hired to assist. Section 1104 is particularly stringent, and I already referred to the 6th Circuit's recent opinion in this regard on examiners, and your Honor has said that the advisers in this case were functioning in all respects similar to bankruptcy examiners.

These people could not have --

THE COURT: Well, you know, I don't think the Circuit read of the Court's Order as the Court intended. The Court did not empower any of its advisers to do anything. We said the broad range of duties may include, and I think everybody has testified it would depend upon the assignment of the Court, if the Court felt that that particular adviser could fulfill a given role.

MR. ENGLERT: And this is why it's critically important, if I may, your Honor, to understand Section 455(a) standard. It is not a standard of actual bias. It is not a standard of actual impropriety. It is not a standard of actual taint.

It is a standard of what would a reasonable person knowing all the circumstances perceive and would that person harbor doubts --

THE COURT: By the way --

MR. ENGLERT: -- about impartiality.

THE COURT: -- during the deposition, Mr. Robbins was sitting there and there was an issue that came up and I said to Mr. Robbins, I said, who is this reasonable person. How would you characterize this person? Is it the man in the street? Is it a person of Mr. Brodsky's training and sophistication? Who is this reasonable person?

MR. ENGLERT: It is a sophisticated person. There's actually an excellent discussion of that exact

issue, your Honor, in the Flamm Book on Judicial Disqualification, which I believe your Honor is familiar with.

THE COURT: You cited in the footnote. I saw that.

MR. ENGLERT: We didn't cite that particular point.

THE COURT: But you cited the Flamm book.

MR. ENGLERT: There is a very good discussion of that particular issue. Let me put it this way.

THE COURT: Your time is expired. Do you need a couple more minutes so you can finish?

MR. ENGLERT: Yes. I'd like to talk about timeliness, which has been a major argument.

THE COURT: Fine. Let's go to timeliness.

MR. ENGLERT: Mr. Brodsky told the truth and Mr. Eckstein told the truth. That's the short version of timeliness on the facts.

Mr. Brodsky's declaration on December 1st said he learned of this on September 24.

THE COURT: I've no reason to disbelieve Mr. Brodsky in his testimony but, you know, let me tell you of a concern I do have. Mr. Brodsky is a very sophisticated businessman. Mr. Brodsky is a graduate of Harvard Law School.

MR. ENGLERT: We won't hold that against him.

THE COURT: Yes. Well, he didn't go to Yale

because people who go to Yale only go to Yale to teach at Harvard, so I understand.

Mr. Brodsky had Pacer in his office. In 90 minutes he found out everything he needed to know after there was a revelation to him by Mr. Fuller.

Mr. Brodsky used to be co-leader of the bankruptcy department at Kramer Levin, had a close relationship with Mr. Eckstein, signed a waiver for Mr. Eckstein so Mr. Eckstein could then represent the bank group.

Mr. Brodsky then, who allegedly, and I know this from reading the papers, has $275 million of the bank debt, somebody said 290, I wouldn't know what he has, I don't know what he paid for it, but throughout the proceedings, and he was here at almost every proceeding, status conferences and all, Mr. Brodsky was there. In fact, for a long time I didn't know who he was or what his role was. I kept seeing his face here, sat through the whole trial every day, never said a word, and what I find really interesting is someone who has $270 million worth of bank debt has no lawyer, has no lawyer from the time he releases Mr. Eckstein until I guess he employs you, has no lawyer.

Query. As he sat here and Kramer Levin was carrying the ball for the bank group, wasn't Kramer Levin de facto his lawyer?

MR. ENGLERT: Well, your Honor, you said -- first

of all, my answer to that question is no; second, my answer is it doesn't matter, and third, my answer is you said some other things I'd like to respond to.

THE COURT: Sure.

MR. ENGLERT: The Pacer point, yes, once one has a reason to look for information about something that may have gone horribly awry about a judge or his advisers, one can sometimes find that information quickly, but our legal system doesn't assume that anything has gone horribly awry by the judge or his advisers and we don't particularly want or have, according to the case law, a rule of law that says please go around digging up dirt on courts and advisers.

THE COURT: Didn't stop Mr. Case from looking into who the advisers were, who is the counsel for the creditors committee, which is the bonds and the banks.

MR. ENGLERT: Yes. He conducted some superficial inquiries, yes.

THE COURT: It just strikes a discordant note that if I invested $275 million, that I wouldn't be doing a full-scale due diligence investigation to find out what's going around.

MR. ENGLERT: Well, there are two ways to go with that, your Honor. One is, do you disbelieve Mr. Brodsky as a matter of fact and I would suggest you can't --

THE COURT: I don't disbelieve Mr. Brodsky as a

matter of fact.

MR. ENGLERT: The second way to go, if I may --

THE COURT: Sure.

MR. ENGLERT: -- is to say we're going to have a legal standard, it is not actual knowledge, and that's an issue we addressed at some considerable length in our brief, all the appellate cases, there are a couple of cases but all the appellate cases use an actual knowledge standard. Why? Because we don't want people in Mr. Brodsky's situation, who have actual knowledge, to sit on that actual knowledge and then come in after they lose something.

THE COURT: What procedural safeguard is there against that, that a person such as Mr. Brodsky, and I've not accused Mr. Brodsky as I think you took umbrage in the Circuit Court of Appeals when somebody assailed Mr. Brodsky. I don't do that. I will have to accept his deposition testimony as it is.

I am speaking about someone who has that type of investment, maybe they should have done more to inform themselves and, as you indicate in your brief, in the Owens Corning case there's probably a thousand people out there who have an interest in this. Is it the Court's obligation to give notice to all these people and how do we do it and, lastly, what is the procedural safeguard for the Court as opposed to someone like Mr. Brodsky, at the conclusion of 22

months coming forward and saying, by the way, I never had notice about Gross and Hamlin.

MR. ENGLERT: Well, the answer to those last two questions, in my view, your Honor, is the same answer. The procedural safeguard is when there's a problem with possibly conflicted advisers or with any possibly conflicted professional under Section 327, do what the Bankruptcy Code suggests, make disclosure at the time of the appointment or at the time the problem comes to the Court's attention and see if the parties will accept those people as advisers or as any other professionals under Section 327, or if the parties won't accept it, then make a resolution about whether the problem is real or imagined, but do it up front.

Let me mention just -- I know my time expired. I don't want to try your patience. Let me mention one last thing. On page 62 of the Owens Corning brief or the joint brief filed by Owens Corning and various tort interests, there are a whole bunch of cases that talk about notice to the creditors committee being notice to everybody so that you don't need to give actual notice to anyone other than the creditors committee.

Every one of those cases turns on a particular bankruptcy rule. None of those bases arises in the conflict of interest or recusal situation. None of them arises in a Section 327 disinterestedness situation. They all -- every

single one of them talks about a particular bankruptcy rule that make notice of a particular action to the creditors committee good enough as opposed to all.

With respect, your Honor, there should have been notice to all creditors. That would have headed off this problem. Thank you.

THE COURT: All right. Thank you. Mr. Mancino.

MR. MANCINO: Good morning, your Honor. May it please the Court, Richard Mancino on behalf of the movants in the W.R. Grace bankruptcy proceeding.

Your Honor, with respect to 455(a)(1), the basis on which we moved for your Honor's disqualification, a reasonable observer would harbor doubts about the impartiality of this Court that received briefings and advice however the advisers may subjectively define advice or no matter how the Court may define advice on substantive issues going to the merits of these cases and received that advice, that input from advisers who are partisans in another complex, hotly contested bankruptcy proceeding that raises issues similar to the issues that are being raised in the five asbestos cases here and involve asbestos claimants who may also have claims in these five asbestos cases.

Now, it's not relevant, your Honor, whether your Honor was aware or unaware of Mr. Hamlin's and Mr. Gross's role in the G-1 bankruptcy and it's not relevant whether or

not your Honor was aware of the precise issues that would come up or could come up in that asbestos litigation, and the reason for that, your Honor, is explained by, well, the Supreme Court in Wilgabor, made that clear.

There can be an appearance of partiality or bias that gives rise to a duty in the district court to disqualify himself or herself even if the district court is unaware of the facts and circumstances that give rise to that appearance or, as in the Wilgabor case, has forgotten those facts or circumstances.

So, your Honor, we don't -- we accept your Honor's statements about what you were or were not aware of, but, unfortunately, under Section 455(a), that is not relevant.

The other basis, your Honor, that we believe gives rise to a duty for your Honor to disqualify himself is that a reasonable observer would harbor even more doubts about the fairness and impartiality of your Honor and, indeed, of these entire bankruptcy proceedings where substantive issues that affect all of the cases are being discussed, whether or not advice is being given but are coming up and being discussed in off-the-record ex parte meetings and conversations, and those are ex parte meetings and conversations that involve both the District Court and the five advisers, including the two advisers whose roles in the G-1 case have brought us here today, but also, the ex parte

communications and discussions that have taken place among the District Court and certain counsel and certain parties in all of these bankruptcy proceedings, including the W.R. Grace proceedings.

Now, your Honor asked a question of Mr. Englert about the significance or lack of significance of the complexity and difficulty of these matters and I, too, will concede that the five bankruptcy cases that your Honor has been entrusted with the administration of are complex. They are difficult. They raise gargantuan challenges for your Honor.

However, with respect to the ex parte communications and the prohibition against them that's set forth both in the case law and in Canon 3(a)(4) of the Code of Conduct for U.S. Judges, there's no safe harbor that permits a regime, a case management regime, of ex parte communications because the case is complex or because it raises serious and difficult challenges and issues.

THE COURT: So, I guess what you're saying is there can be no consent.

MR. MANCINO: I'm not saying that, your Honor. There can be consent to specific ex parte communications that fall within the exception to the prohibition against them. In the case where matters of administration are being raised, in matters involving settlement, where the Court